APPENDIX A

DA1:\421116\01\90X_01!.DOC\99980.0001

Dockets.Justia.com

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Steve Weinberg, Plaintiff, vs. National Football League Players Association, Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Roger Kaplan, John Collins, Keith Washington, Tony Agnone, Howard Shatsky, and Mark Levin, Defendants.	§ § § § § § § § § § § § § §	Civil Action No. 3-06-CV2332-B **ECF**

DECLARATION OF AARON D. FORD

AARON D. FORD hereby declares, under penalty of perjury, as follows:

1. I am an attorney and member of the State Bar of Texas. I submit this Declaration, of my own personal knowledge, in opposition to the plaintiff's motion to remand.

2. Attached hereto as Exhibit 1 is a true and accurate copy of Sports At Work Enters., Inc. v. Silber, No. 3-05-CV-2413-BD, Memorandum Opinion & Order (Mar. 21, 2006) (unpublished opinion).

3. Attached hereto as Exhibit 2 is a true and accurate copy of In re Dunn, CV 05-1000, slip op. (C.D. Cal. March 1, 2006).

4. Attached hereto as Exhibit 3 is a true and accurate copy of Article VI of the extended NFL Collective Bargaining Agreement ("CBA").

5. Attached hereto as Exhibit 4 is a true and accurate copy of Diaz v. Gulf Coast Legal Found., No. H-88-0512, 1990 WL 282587 (S.D. Tex. Nov. 8 1990) (unpublished opinion).

6. Attached hereto as Exhibit 5 is a true and accurate copy of Frost v. Harper, No. Civ. A. C-01-069, 2001 WL 34063533 (S.D. Tex. Mar. 23, 2001) (unpublished opinion).

7. Attached hereto as Exhibit 6 is a true and accurate copy of Weinberg v. Sowell, No. Civ. A. 06-0611, Notice of Removal (May 24, 2006).

8. Attached hereto as Exhibit 7 is a true and accurate copy of Weinberg v. Sowell, No. Civ. A. 06-0611, Order and Judgment (July 14, 2006).

9. Attached hereto as Exhibit 8 is a true and accurate copy of Weinberg v. Sowell, No. Civ. A. 06-0611, Order (June 22, 2006).

10. Attached hereto as Exhibit 9 is a true and accurate copy of the NFLPA Regulations Governing Contract Advisors ("NFLPA Regulations") (appendices omitted).

11. Attached hereto as Exhibit 10 is a true and accurate copy of Flanders v. Fortis Ins. Co, No. SA-05-CA-0726-RF, 2005 WL 3068779 (W.D. Tex. Nov. 14, 2005) (unpublished opinion).

12. Attached hereto as Exhibit 11 is a true and accurate copy of Walker v. Philip Morris, Inc., No. Civ. A. 02-2995, 2003 WL 21914056 (E.D. La. Aug. 8, 2003) (unpublished opinion).

13. Attached hereto as Appendix B is a true and accurate copy of the Declaration of Keith Washington.

14. Attached as hereto as Appendix C is a true and accurate copy of the Declaration of John Collins.

15. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on March 6, 2007.

Aaron D. Ford

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SPORTS AT WORK ENTERPRISES, INC.	§	
	§	
Plaintiff,	§	
	§	NO. 3-05-CV-2413-BD
VS.	§	
	§	
HOWARD SILBER, ET AL.	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Plaintiff Sports At Work Enterprises, Inc. ("Sports At Work") has filed a motion to remand this declaratory judgment and wrongful garnishment action to Texas state court. [Doc. #14]. For the reasons stated herein, the motion is denied.

I.

This suit arises from two writs of garnishment issued by this court at the request of Howard Silber, Individually and d/b/a Pacific Sports & Entertainment ("Silber"), as part of his efforts to collect a federal judgment against Steve Weinberg and Steve Weinberg & Associates, Inc. ("Weinberg"). In June 1998, Silber and Weinberg entered into an oral agreement to represent some 51 professional athletes, including Stephen Davis, a running back for the Washington Redskins. Although the terms of their agreement were never memorialized in writing, Silber and Weinberg purportedly agreed to share equally in all expenses incurred in recruiting clients and in commissions of up to 3% of the clients' compensation. When the joint venture dissolved, Weinberg filed suit in Texas state court. Silber timely removed the case to federal court. The parties subsequently agreed to arbitrate their dispute. Following a hearing in March 2000, the arbitrator ordered that Silber and

Weinberg "split" all fees earned on Davis' 1999 and 2000 contracts. The 2000 contract extended for eight years and was valued at approximately $135 million. The 3% agent's commission amounted to over $4 million.

On November 9, 2000, Silber filed a motion in the pending federal lawsuit to confirm the arbitration award. Weinberg countered with a motion to vacate the award. After 14 months of protracted litigation, including a limited remand to the arbitrator for the purpose of making specific corrections and clarifications to the award, the court confirmed the amended arbitration award and ordered Weinberg to pay Silber:

> the sum specified in the Clarified Arbitration Award that was confirmed by this Court. That sum is to include: the agent's fees already owed from Stephen Davis' 1999 and 2000 NFL contracts ($95, 010.00), the amount (1.5% of earnings) under the NFL contracts for the 2001 through 2008 seasons (up to a total of $2,031,750.00), attorney's fees in the amount of $28,500.00, pre-judgment interest in the amount of $8,275.20, and post-judgment interest at the rate of 2.24% per annum.

Weinberg v. Silber, No. 3-99-CV-1432-D (N.D. Tex. Feb. 28, 2002).[1] The final judgment expressly incorporates the terms and conditions of the amended arbitration award, which provides, *inter alia*:

> [W]ith respect to and exclusively for Mr. Davis' 1999 contract, Mr. Weinberg is ordered to pay Mr. Silber a sum of $14,010.00 . . . . no later than ten (10) days from the date of this arbitration award.
>
> * * * *
>
> Mr. Weinberg is therefore ordered to pay 1.5% of any amounts currently paid to Mr. Davis under his 2000 through 2008 contract, and such payments are to be made no later than ten (10) days from the date of this Arbitration Award. Thereafter all payments from Mr. Weinberg to Mr. Silber are to be paid no later than ten (10) days from the date Mr. Davis is paid pursuant to the subject 2000 through 2008 contract.

---

[1] The final judgment entered on February 28, 2002 amends a prior judgment entered on January 22, 2002. The only difference between the original judgment and the amended judgment is the post-judgment interest rate.

Wienberg timely appealed the judgment to the Fifth Circuit Court of Appeals.

While this appeal was pending, Silber registered the federal judgment with the Dallas County Clerk as permitted by the Uniform Enforcement of Foreign Judgments Act ("UEFJA"), Tex. Civ. Prac. & Rem. Code § 35.001, *et seq.* That action prompted Weinberg to file a motion to vacate the judgment in Texas state court. At oral argument on the motion, Weinberg advanced one of the arguments he raised on direct appeal--that the federal judgment is inconsistent, ambiguous, and self-contradictory. The state judge took the matter under advisement, but later ruled that the federal judgment was void for vagueness. *Weinberg v. Silber*, No. 02-10945-E (Dallas Co. Ct. at Law #5, Nov. 25, 2002). Silber appealed the ruling, but his appeal was dismissed for want of prosecution after he failed to file a brief. *Silber v. Weinberg*, No. 11-03-CV-00029-CV (Tex. App.--Eastland, Aug. 7, 2003).

On January 6, 2003, just seven weeks after the Texas court vacated the federal judgment, the Fifth Circuit affirmed the very same judgment. In its opinion, the court summarily rejected Weinberg's argument that the judgment was "self-contradictory as to a material term and incapable of compliance." According to the court:

> The amended arbitration award [ ] clearly and unambiguously specifies when payments to Silber are due: Amounts earned on the 1999 contract and any amounts already paid to Weinberg under the 2000-08 contracts are due within ten days of the date of the arbitration award; all other payments are to be paid within ten days of the date that Stephen Davis is paid.
>
> Given the precise terms of the amended arbitration award, the amended final judgment, which is "to conform with the terms and conditions" of the amended award, is neither "self-contradictory" nor invalid. Although the term "sum" as used in the final judgment may be slightly ambiguous, the district court expressly adopted the terms and conditions of the arbitration award, which dictates beyond cavil Weinberg's schedule of payments. Accordingly, Weinberg's argument that the final judgment is "incapable of compliance" is meritless.

Weinberg v. Silber, 57 Fed. Appx. 211, 2003 WL 147530 at * 2-3 (5th Cir. Jan. 6, 2003).[2]

After the Fifth Circuit upheld the validity of the federal judgment, Silber filed a garnishment action in federal district court against Burleson Pate & Gibson, L.L.P. ("BP&G"), a Dallas law firm, and Compass Bank ("Compass"), a local financial institution, in an attempt to collect any funds held for Weinberg. *Silber v. Weinberg*, No. 3-04-CV-2199-P (N.D. Tex., filed Oct. 10, 2004). BP&G answered that it was indebted to Weinberg in the amount of $9,758.51, "this sum representing an agent's fee paid into an escrow account by an N.F.L. football player, Erron Kinney." That money was paid to Silber who, in turn, dismissed BP&G from the garnishment suit. Compass denied that it was indebted to Weinberg, but allegedly provided Silber with confidential and proprietary financial records pertaining to Sports At Work, who is not a party to the federal judgment, pursuant to a subpoena duces tecum.[3] Upon receiving notice of the federal garnishment action, Sports At Work, as plaintiff, filed suit against Silber in Texas state court to preclude him from enforcing the federal judgment. Plaintiff also included claims against Silber, BP&G, and Compass for wrongful garnishment and a separate claim against Compass for the unauthorized disclosure of financial information. BP&G, with the consent of Silber and Compass, timely removed the case to federal court. In its removal notice, BP&G alleges that federal jurisdiction is proper because plaintiff's claims implicate the validity of a federal judgment that was affirmed by the Fifth Circuit and relate to a writ of garnishment issued by a federal district court. (*See* BP&G Not. of Rem. at 2, ¶ 3). Plaintiff now argues that the case should be remanded to Texas state court because, under the "well pleaded complaint" rule, the state court petition does not assert any claims arising under the Constitution or laws of the United States. The motion to remand has been fully briefed by the parties and is ripe for determination.

---

[2] At oral argument before the Fifth Circuit, Weinberg pointed to another internal "inconsistency" in the arbitration award--that paragraph five of the award, which requires "a split on fees paid only with respect to .... Stephen Davis," conflicts with paragraph nine of the award, which orders all prospective payments from Weinberg to Silber to be paid within 10 days from the date Stephen Davis is paid. The Fifth Circuit had little difficulty reconciling those two paragraphs:

> Paragraph five sets forth the arbitrator's award in general terms--Weinberg and Silber are to split agent commissions, i.e., "fees paid," with respect to one client, Stephen Davis. Paragraph nine outlines, in detail, the payment arrangement: Weinberg is to pay Silber "1.5% of each dollar earned by Stephen Davis" no later than ten days from the date that Davis is paid. We acknowledge that under this payment plan, any risk of Davis's default is to be shouldered exclusively by Weinberg, whose obligation to Silber is triggered by the Redskins payment to Davis, regardless of whether David in turn pays Weinberg. We nevertheless decline to reexamine either the arbitrator's motive in crafting the payment terms or the merits of the underlying award.

Weinberg, 2003 WL 147530 at * 3 (emphasis in original).

[3] Sports At Work contends it is a separate entity that is neither owned nor controlled by Weinberg or Weinberg & Associates, Inc. (Plf. Orig. Pet at 4, ¶ 10).

II.

A case may be removed to federal court if it is "founded on a claim or right arising under the Constitution, treaties or laws of the United States . . . ." 28 U.S.C. § 1441(b). The analysis of this statute is controlled by the well-pleaded complaint rule. This rule provides that a "properly pleaded complaint governs the jurisdictional determination, and if, on its face, such a complaint contains no issue of federal law, then there is no federal question jurisdiction." *Aaron v. National Union Fire Insurance Co.*, 876 F.2d 1157, 1160-61 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1121 (1990); *Flowerette v. Heartland Healthcare Center*, 903 F.Supp. 1042, 1044 (N.D. Tex. 1995) (Kaplan, J.). Stated differently, removal is proper if the complaint establishes: (1) that federal law creates the cause of action; or (2) that the case necessarily depends on a substantial question of federal law in that federal law is a necessary element of one of the well-pleaded claims. *Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 2856, 77 L.Ed.2d 420 (1983); *see also Christianson v. Colt Industries*

Operating Corp., 486 U.S. 800, 808-09, 108 S.Ct. 2166, 2173-74, 100 L.Ed.2d 811 (1988). This determination must be based on the claims asserted by the plaintiff, "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Franchise Tax Board*, 103 S.Ct. at 2846.

On its face, the state court petition alleges claims arising solely under Texas law. Nevertheless, BP&G and Silber contend that removal is proper because the state court action is nothing more than an attack on the federal judgment. (BP&G Resp. at 2; Silber Resp. at 1-2). The Fifth Circuit has repeatedly held that an action brought in state court to nullify or circumvent a prior federal order or judgment is removable to federal court on the ground that it is founded on a claim or right arising under the laws of the United States. *See, e.g. Royal Insurance Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1292 (5th Cir. 1992); *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976); *Deauville Associates v. Lojoy Corp.*, 181 F.2d 5, 6 (5th Cir.), *cert. denied*, 71 S.Ct. 281 (1950). As stated by one judge who confronted a similar issue in a motion to remand:

> It is well settled that a Federal District Court can exercise ancillary jurisdiction over a second action in order "to secure or preserve the fruits and advantages of a judgment or decree rendered" by that court in a prior action. Such jurisdiction is appropriate where the effect of an action filed in State court would "effectively nullify" the judgment of a prior federal action. This is true even where the Federal District Court would not have jurisdiction over the second action if it had been brought as an original suit.

Lowery v. Foremost Insurance Co., No. J-92-0323(B), 1992 WL 366912 (S.D. Miss. Dec. 3, 1992), *quoting Royal Insurance*, 960 F.2d at 1292.

In an attempt to distinguish this case from the authorities cited by BP&G and Silber, plaintiff argues that its state claims are not predicated on whether the federal judgment is valid or invalid.

Rather, plaintiff alleges that "by virtue of the State Court Judgment, Silber is collaterally estopped, under Texas law, to enforce the Federal Court Judgment, regardless of whether it is actually void for vagueness on the merits." (Plf. Reply at 2; *see also* Plf. Orig. Pet. at 7, ¶ 18).[4] Because the issue of collateral estoppel involves a question of state law, plaintiff maintains that there is no basis for removing the case to federal court. Even if the court were to accept this argument with respect to plaintiff's declaratory judgment claim, other claims alleged in the petition clearly implicate the validity of the federal judgment. For example, plaintiff sues Silber, BP&G, and Compass for wrongful garnishment because "*the Federal Court Judgment was void for vagueness and unenforceable* and . . . to the extent [the writ of garnishment] affected funds belonging to Sports at Work, because Sports at Work was not a party to or liable under the Federal Court Judgment." (*See* Plf. Orig. Pet. at 7-8, ¶ 20 & 8, ¶ 22) (emphasis added). The merits of this claim depend, at least in part, on the inherent validity or invalidity of the federal judgment--not the procedural defense of collateral estoppel.

The court has little difficulty in concluding that the civil action brought by plaintiff in Texas state court implicates the validity of a prior federal judgment and relates to a federal writ of garnishment. Under these circumstances, the state case was properly removed to federal court. Plaintiff's motion to remand is denied.

SO ORDERED.

DATED: March 21, 2006.

JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

[4] This collateral estoppel argument is the subject of cross-motions for summary judgment now pending in the federal garnishment action.

EXHIBIT 2

FILED
CLERK U.S. DISTRICT COURT
MAR - 1 2006
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Priority
Send
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

SCANNED

ENTERED
CLERK, U.S. DISTRICT COURT
MAR - 2 2006
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re DAVID LAWRENCE DUNN NATIONAL FOOTBALL LEAGUE ASSOCIATION, INC. Plaintiff, v. DAVID LAWRENCE DUNN, Defendant.	SA CV 05-1000(RSWL) SA 03-11003 RA **ORDER**

Plaintiff National Football League Association's ("NFLPA") Motion for Summary Judgment and Defendant David

65

Dunn's Motion for a Continuance pursuant to Federal Rule of Civil Procedure 56(f) came on regularly for hearing on Monday, February 27, 2006. After having considered all of the papers and argument in the matter

SCANNED

THE COURT NOW FINDS AND RULES AS FOLLOWS:

First, this Court **DENIES** Defendant Dunn's 56(f) request and proceeds to determine NFLPA's pending request for Summary Judgment. This Court finds that purely legal questions are presented for this Court regarding the legal effect of Defendant-Debtor David Dunn's Contract Advisor certification with the National Football League Players' Association.

Second, as to Plaintiff NFLPA's Motion for Summary Judgment, this Court finds that no genuine issue of material fact exists making Summary Judgement appropriate; and therefore **GRANTS** the request. As to Plaintiff's Complaint for Declaratory Judgment, this Court finds as follows

(1) Section 9(a) of the National Labor Relations Act provides that the NFLPA's Collective Bargaining Agreement gives the NFLPA, as the exclusive bargaining representative of NFL players, sole discretion in choosing its agents. See White v. NFLPA, 92 F. Supp.

2d 918, 924 (D. Minn. 2000); Collins v. NBA Players Assn., 850 F. Supp. 1468, 1475 (D. Colo. 1991); and see H.A. Artists Assocs. v. Actors' Equity Assn., 451 U.S. 704 (1981).

(2) David Dunn and the NFLPA formed an **executory contract.** In re CFLC, Inc., 89 F.3d 673, 677 (9th Cir. 1996). Dunn applied to perform services for the NFLPA as a Contract Advisor by submitting his application, which serves as the offer to form the contract. The NFLPA accepted Dunn's offer to serve as a Contract Advisor by the terms of the application when it certified him. The consideration supporting the contract is Dunn's being allowed to serve as a Contract Advisor, representing the NFLPA on its behalf in salary negotiations between NFL clubs and NFL players, in exchange for Dunn's being bound by the NFLPA's regulations, including disciplinary procedures.

This Court finds that Dunn does not have, what he has characterized as, a license to pursue a profession, which is not governed by contract principles and obligations. Also, Dunn's compliance with the Agent Regulations was not conditioned on his performance of actually negotiating player contracts. Rather, while Dunn was under no obligation to actually negotiate NFL player salary contracts, as long as he retained the status of an NFLPA certified agent, he was bound to the standards expressed in the NFLPA Agent Regulations, including the disciplinary procedures. Noncompliance with the Agent Regulations including the disciplinary procedures effectively puts Dunn in breach of his agreement with the NFLPA.

(3) As an **executory contract**, pursuant to Section 365(c) of the bankruptcy code, Dunn **may not assign and may not assume** the Dunn Agreement without the consent of the NFLPA. But, this Court finds that it is precluded from compelling Dunn to reject the contract, as this falls within the clear discretion of the bankruptcy court.

(4) Finally, Section 362(a) of the bankruptcy code halts the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . .," which clearly includes the NFLPA's disciplinary proceedings against Dunn and any resulting arbitration.

Here, the NFLPA asks this Court to decide whether Dunn is entitled to continue to act as a Contract Advisor without the consent of the NFLPA and without complying with the NFLPA Regulations. Absent the imposition of the bankruptcy court's automatic stay, the answer to this question is no. Defendant Dunn must comply with his contract obligations and submit to the NFLPA's disciplinary proceedings.

SCANNED

But this case illustrates the fact that the exclusive rights of the NFLPA, as the sole collective bargaining representative of NFL players, are in direct conflict with the protections afforded a debtor in bankruptcy by way of the automatic stay. And, this Court must honor the imposition of the automatic stay as the controlling principle is that lifting or not lifting the stay is a discretionary matter for the bankruptcy court. See Sommax Industries, 907 F.2d 1280 (2d Cir. 1990).

However, this determination is uncomfortably at odds with the NFLPA's exclusive right to determine to whom it delegates its bargaining authority. Ultimately, the bankruptcy stay forces the NFLPA to retain Dunn's certification status complete with the rights and privileges afforded to NFLPA Contract Advisors, without requiring Dunn to submit to his contractual obligations, namely the NFLPA's Regulations and disciplinary proceedings. Most importantly, the NFLPA is forced to allow Dunn to act as an agent on its behalf and use its exclusive bargaining authority, even though the NFLPA clearly wishes to subject Dunn to its internal discipline procedures and potentially cease its relationship with him. Options, both of which would be available to it, if the stay was lifted. In essence the bankruptcy's automatic stay trumps and undermines the exclusive authority vested in the NFLPA through the National Labor Relations Act.

SCANNED

Therefore, this Court **GRANTS** Plaintiff National Football League Players' Associations' Motion for Summary Judgment and adopts Plaintiff's Statement of Uncontroverted Facts with modifications made by the Court.

IT IS SO ORDERED.

RONALD S.W. LEW

RONALD S.W. LEW
United States District Judge

DATED: 3-01-06

EXHIBIT 3

ARTICLE VI
NFLPA AGENT CERTIFICATION

Section 1. **Exclusive Representation:** The NFLMC and the Clubs recognize that, pursuant to federal labor law, the NFLPA regulates the conduct of agents who represent players in individual contract negotiations with Clubs. The NFLMC and the Clubs agree that the Clubs are prohibited from engaging in individual contract negotiations with any agent who is not listed by the NFLPA as being duly certified by the NFLPA in accordance with its role as exclusive bargaining agent for NFL players. The NFLPA shall provide and publish a list of agents who are currently certified in accordance with its agent regulation system, and shall notify the NFLMC and the Clubs of any deletions or additions to the list pursuant to its procedures. The NFLPA agrees that it shall not delete any agent from its list until that agent has exhausted the opportunity to appeal the deletion pursuant to the NFLPA's agent regulation system, except: (i) where an agent has failed to pass a written examination given to agents by the NFLPA or (ii) in extraordinary circumstances where the NFLPA's investigation discloses that the agent's conduct is of such a serious nature as to justify immediately invalidating the agent's certification. The NFLPA shall have sole and exclusive authority to determine the number of agents to be certified, and the grounds for withdrawing or denying certification of an agent. The NFLPA agrees that it will not discipline, dismiss or decertify agents based upon the results they achieve or do not achieve in negotiating terms or conditions of employment with NFL Clubs. This section shall not limit the NFLPA's ability to discipline agents for malfeasance.

Section 2. **Enforcement:** Under procedures to be established by agreement between the NFL and the NFLPA, the Commissioner shall disapprove any NFL Player Contract(s) between a player and a Club unless such player: (a) is represented in the negotiations with respect to such NFL Player Contract(s) by an agent or representative duly certified by the NFLPA in accordance with the NFLPA agent regulation system and authorized to represent him; or (b) acts on his own behalf in negotiating such NFL Player Contract(s).

Section 3. **Penalty:** Under procedures to be established by agreement between the NFL and the NFLPA, the NFL shall impose a fine of $15,000 upon any Club that negotiates any NFL Player Contract(s) with an agent or representative not certified by the NFLPA in accordance with the NFLPA agent regulation system if, at the time of such negotiations, such Club either (a) knows that such agent or representative has not been so certified or (b) fails to make reasonable inquiry of the NFLPA as to whether such agent or representative has been so certified. Such fine shall not apply, however, if the negotiation in question is the first violation of this Article by the Club during the term of this Agreement. It shall not be a violation of this Article for a Club to negotiate with any person named on (or not deleted from) the most recently published list of agents certified by the NFLPA to represent players.

EXHIBIT 4

C
Diaz v. Gulf Coast Legal FoundationS.D.Tex.,1990.
United States District Court, S.D. Texas, Houston Division.
Genaro E. DIAZ, Plaintiff,
v.
GULF COAST LEGAL FOUNDATION et al., Defendants.
No. H-88-0512.

Nov. 8, 1990.

NORMAN W. BLACK, District Judge:
***1** This is a suit arising under the Labor Management Relations Act, 29 U.S.C. 141-187 (West 1978) (LMRA), and various state claims. Plaintiff, Genaro E. Diaz, was employed by Defendant, Gulf Coast Legal Foundation (the Foundation), from 1977 to 1986.FN1 The other Defendants are employed by the Foundation as board members, directors or supervisors. During the period of Plaintiff's employment, the Foundation and the Gulf Coast Organization of Legal Services Workers (the Union) entered into a collective bargaining agreement (CBA). In May 1986, Plaintiff was terminated as an employee of the Foundation. He contends the termination was wrongful.

***1** Plaintiff began to pursue his administrative remedies through the Union, but he admits that he has not yet exhausted those remedies. In February 1988, he filed suit against Defendants, alleging: breach of written, oral and implied contracts; wrongful discharge; intentional infliction of emotional distress; fraudulent misrepresentation; interference with contractual relations; outrageous and abusive discharge; defamation; libel; slander; breach of implied covenant of good faith and fair dealing; discrimination based upon sex, race, and national origin; violation of the Fourteenth Amendment of the United States Constitution; violation of his rights under the LMRA, violation of his privacy rights under the Texas Constitution; and violation of the Commission on Human Rights Act, Tex.Rev.Civ.Stat.Ann. art. 5221k (Vernon 1987).

***1** The Defendants have moved for summary judgment on all of Plaintiff's claims. (Instrument # 16). Plaintiff has responded to Defendants' motion. (Instrument # 17). The Defendants urge three primary reasons why summary judgment should be granted. First, the state law claims are preempted by the LMRA. Second, Plaintiff has failed to exhaust his administrative remedies. Third, some state claims are barred as a matter of law.

***1** Rule 56(c) provides that "[summary] judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the Court of the basis for the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which he believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams,* 836 F.2d 958, 960 (5th Cir.1988). The burden is not on the defendant, as movant, to produce evidence showing the absence of a genuine issue of material fact. *See Int'l. Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.,* [106 LC ¶ 12,291] 812 F.2d 219, 222 (5th Cir.1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of a plaintiff's case. *Id.*

***2** After the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex,* 106 S.Ct. at 2552-53. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue of trial. *Anderson v. Liberty Lobby, Inc.,*

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

106 S.Ct. 2505, 2514 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. *Williams v. Weber Mgmt. Serv., Inc.,* 839 F.2d 1039, 1041 (5th Cir.1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. *St. Amant v. Benoit,* 806 F.2d 1294, 1297 (5th Cir.1987). Mere allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.,* 831 F.2d 77, 79 (5th Cir.1987).

*2 In considering a motion for summary judgment, the Court must view the evidence through the prism of the substantive evidentiary burden. *Liberty Lobby,* 106 S.Ct. at 2513. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 106 S.Ct. 1348, 1356-57 (1986). Summary judgment is inappropriate if the evidence before the Court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas,* 833 F.2d 565, 567 (5th Cir.1987).

I. Privileged Statements

*2 Defendants contend that Plaintiff's causes of action for defamation, libel and slander are all barred because the claims are based on statements made during quasi-judicial proceedings.

*2 Plaintiff alleges that Defendants injured him when they made "false" statements to the Texas Employment Commission, Equal Employment Opportunity Commission, and the National Labor Relations Board. During proceedings with the commissions, Defendants allegedly told the members of the board and commission that Plaintiff had "falsified his sign-in/sign-out sheet." Those statements, made during quasi-judicial proceedings, are absolutely privileged against claims of libel or slander. *Astro Resources Corp. v. Ionics, Inc.,* 577 F.Sup. 446, 447 (S.D.Tex.1983); *Hyles v. Mensing,* [109 LC ¶ 10,568] 849 F.2d 1213, 1217 (9th Cir.1988) (the plaintiff alleged that his supervisors filed false reports and gave false testimony during grievance proceedings; the Court held that the statements were privileged). Plaintiff's claims of defamation, libel and slander must fail as a matter of law because the statements are privileged.

*2 Alternatively, the claims are preempted by the LMRA unless malice is shown. *Strachan v. Union Oil Co.,* [103 LC ¶ 11,590] 768 F.2d 703, 706 (5th Cir.1985). Plaintiff has not shown that the statements were made maliciously; or, that the statements were false.

II. Preemption of State Claims by Federal Law

*3 Defendants urge that Plaintiff's state claims are preempted by Federal law. For many years, the federal courts have held that a single body of substantive labor law is necessary; therefore, federal law often preempts state law in this area. *Local 174 Teamsters v. Lucas Flour Co.,* [44 LC ¶ 50,470] 82 S.Ct. 571, 576 (1962). Federal labor law preemption has been applied in various types of claims, including tort claims that arise from labor disputes. *See Allis-Chalmers Corp. v. Lueck,* [102 LC ¶ 11,395] 105 S.Ct. 1904, 1915 (1985). Preemption is proper if the asserted state claim "requires the interpretation of a collective-bargaining agreement," *Lingle v. Norge Div. of Magic Chef, Inc.,* [108 LC ¶ 10,478A] 108 S.Ct. 1877, 1885 (1988), or is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," *Allis-Chalmers,* 105 S.Ct. at 1916.

*3 Plaintiff's state claims include breach of contract, wrongful discharge, intentional infliction of emotional distress, fraudulent misrepresentation, interference with contractual relations, outrageous and abusive discharge, and breach of implied covenant of good faith and fair dealing. Plaintiff also asserts that Defendants violated his privacy rights under the Texas Constitution.

*3 A. *Breach of Contract:* Plaintiff's claim for breach of contract is clearly preempted by federal labor law. The CBA is the only contract at issue in this case. The record does not indicate that there were any other individual employment contracts between Plaintiff and Defendants. Any violation of a CBA necessarily

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

involves an interpretation of that agreement under section 301 of the LMRA. Lingle, 108 S.Ct. at 1885; *see also* Eitmann v. New Orleans Public Serv., Inc., [100 LC ¶ 10,985] 730 F.2d 359, 365 (5th Cir.1984).

*3 B. *Breach of Implied Covenant of Good Faith/ Fair Dealing:* A claim for breach of implied covenant of good faith and fair dealing is preempted by the LMRA. Allis-Chalmers, 105 S.Ct. at 1914; Newberry v. Pacific Racing Ass'n., 854 F.2d 1142, 1147-48 (9th Cir.1988). The duty of good faith derives from the rights and obligations established by the contract at issue. Allis-Chalmers, 105 S.Ct. at 1914. Any attempt to find a breach of such duty will necessarily involve contact interpretation. *Id.*

*3 C. *Intentional Infliction of Emotional Distress:* In Windfield v. Dover Corp., [113 LC ¶ 11,705] 890 F.2d 764, 767 (5th Cir.1989), the Fifth Circuit stated that the Supreme Court, in Farmer v. United Brotherhood of Carpenters, [81 LC ¶ 13,056] 97 S.Ct. 1056, 1065-66 (1977), created an exception to preemption in a claim for intentional infliction of emotional distress. In a more recent opinion, however, the Fifth Circuit explained the *Farmer* decision in greater detail, and held that a claim for intentional infliction of emotional distress may be preempted. *Brown v. Southwestern Bell Tele. Co.,* [115 LC ¶ 10,081] 901 F.2d 1250, 1256 (5th Cir.1990). In *Brown,* the plaintiff's claim was preempted by the LMRA because the alleged conduct resulting from the plaintiff's discharge was related to the federal concerns addressed by the LMRA. *Id.* The Court explained that alleged improper labor practices cannot constitute the "outrageous conduct" necessary to establish the tort of intentional infliction of emotional distress. *Id.*

*4 The Ninth Circuit has dealt with this question many times, and has given the *Farmer* decision a very narrow interpretation. In *Newberry,* the plaintiff's claim of emotional distress arose from her discharge and the defendant's conduct in the investigation surrounding the discharge. 854 F.2d at 1149. The Ninth Circuit decided that the validity of her claim required the Court to determine whether the discharge was justified under the terms of the CBA. *Id.* at 1149-50.

*4 The facts in this case are very similar. As in *Newberry,* all of Plaintiff's allegations concerning his emotional distress arise from his discharge. Further, the alleged conduct of Defendants in this case does not rise to the level of "outrageous" conduct anticipated in *Farmer. See* Brown, 901 F.2d at 1256. The Court finds that preemption applies to Plaintiff's claim of intentional infliction of emotional distress.

*4 D. *Outrageous Discharge:* Plaintiff's claim of "outrageous discharge" is also preempted. In *Brown,* the plaintiff stated his claim in terms of "extreme and outrageous conduct," which was simply another way of asserting wrongful discharge. 901 F.2d at 1255. Plaintiff has made the same assertion in this case. As in *Brown,* the Court finds that this claim is preempted.

*4 E. *Tortious Interference with Contractual Relations and Wrongful Discharge:* The "tortious interference with contractual relations" and "wrongful discharge" claims are also preempted. In Johnson v. Anheuser Busch, Inc., [111 LC ¶ 11,207] 876 F.2d 620, 624 (8th Cir.1989), the Court held that these claims require an examination of the CBA and the scope of the employment relationship. The alleged "interference" in this case results directly from Plaintiff's discharge. Whether that discharge was "wrongful" depends on the terms of the CBA. *Id.*

*4 F. *Fraudulent Misrepresentation:* If the alleged misrepresentations were made during the bargaining process, fraudulent misrepresentation claims may also be preempted. Parker v. Connors Steel Co., [109 LC ¶ 10,742] 855 F.2d 1510, 1515 (11th Cir.1988), *cert. denied,* [111 LC ¶ 11,114] 109 S.Ct. 2066 (1989). The Fifth Circuit has distinguished between cases in which the company fraudulently misrepresented the contents of a contract, and those in which the company fraudulently induced an employee to enter into a bargaining agreement. *See* Wells v. Gen. Motors Corp., [113 LC ¶ 11,524] 881 F.2d 166, 173 (5th Cir.1989), *cert. denied,* [115 LC ¶ 10,123] 110 S.Ct. 1959 (1990). If a plaintiff shows that a defendant made representations contrary to those in the contract, then interpretation of the CBA would be necessary. But, if the company made representations relating to a matter that was not addressed in the contract,

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

interpretation of the CBA would not be necessary and preemption would not apply. *See Id.*

*4 The record in this case is not clear as to the content of the alleged false misrepresentations, or when the Defendants made such misrepresentations to Plaintiff. Thus, the Court is unable to determine whether preemption applies to Plaintiff's claim of false misrepresentation.

*5 Because Plaintiff has failed to raise specific facts to support his allegation of fraudulent misrepresentation, however, he has not shown that a genuine fact issue exists. Under *Celotex,* Plaintiff's claim of fraudulent misrepresentation must fail. 106 S.Ct. at 2552.

*5 G. *Violation of State Privacy Rights:* Even state constitutional privacy claims may be preempted by the LMRA. *See Utility Workers of America, Local 246 v. Southern California Edison Co.,* [108 LC ¶ 10,470] 852 F.2d 1083, 1086 (9th Cir.1988), *cert. denied,* [111 LC ¶ 10,980] 109 S.Ct. 1530 (1989) ("Nonnegotiable state-law rights" cannot be preempted, but some rights can be negotiated away); *Jackson v. Liquid Carbonic Corp.,* [110 LC ¶ 10,848] 863 F.2d 111, 112 (1st Cir.1988), *cert. denied,* [111 LC ¶ 11,210] 109 S.Ct. 3158 (1989) (state privacy claim was preempted). In this case, however, Plaintiff does not show how Defendants violated his privacy rights. The Court cannot, therefore, determine whether the claim concerns a matter within the terms of the CBA.

*5 Again, however, Plaintiff has failed to support his allegation of a privacy violation with specific facts. No genuine fact issues tending to show a privacy violation have been presented. *Celotex,* 106 S.Ct. at 2552.

III. Exhaustion of Remedies Under the LMRA

*5 Having found that Plaintiff's state claims are preempted by federal labor law, the Court must still decide whether Plaintiff has exhausted his administrative remedies under section 301 of the LMRA. The Supreme Court clearly requires that any claim brought under section 301 of the LMRA must go through the arbitration procedure established in the CBA before suit is filed in federal court. *Allis-Chalmers,* 105 S.Ct. at 1915. If a Plaintiff fails to make use of the grievance procedure in the CBA, his claim should be dismissed. *Id.* In *Bache v. AT & T,* [108 LC ¶ 10,407] 840 F.2d 283, 288 (5th Cir.), *cert. denied,* [110 LC ¶ 10,805] 109 S.Ct. 219 (1988), the Fifth Circuit noted the few exceptions to this general rule:

*5 (1) If the parties to the CBA expressly agreed that arbitration was not the exclusive remedy for the claims;

*5 (2) If the union wrongfully refuses to process the employee's grievance, thus violating its duty of fair representation;

*5 (3) If the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract; or

*5 (4) If exhaustion of contractual remedies would be futile because the aggrieved employee would have to submit his claim to a group which is in large part chosen by the entities against whom his real complaint is made.

*5 In this case, Plaintiff has not attempted to show that any four of the above exceptions applies to his case. In the CBA between the Union and the Foundation the mandatory grievance procedure is set out in a series of steps that Plaintiff must follow. The third step requires a request that a personnel committee hear the grievance. (section 7). The personnel committee's decision may then be appealed to binding arbitration. (section 11.72). Either the Union or Management may demand arbitration. (section 11.74). A neutral arbitrator is chosen by the Union and a Management representative. (section 11.73). The decision of the neutral arbitrator shall be final and binding. (section 11.72).

*6 In a deposition attached to Defendant's motion, Plaintiff admitted that he had not exhausted all of these administrative procedures. He had asked the Union to seek arbitration, but arbitration had apparently not begun. In Plaintiff's response to summary judgment, he states that "the union chose to appeal the decision of the Personnel Committee to binding arbitration." Requesting arbitration is not sufficient, however. Plaintiff should have refrained from filing

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

suit until the arbitration process was complete. Plaintiff's claim under the LMRA must fail for this reason.

FN1. Another Plaintiff, Windell E. Cooper Porter, has settled with Defendants, and is no longer a party in the pending lawsuit.

S.D.Tex.,1990.
Diaz v. Gulf Coast Legal Foundation
Not Reported in F.Supp., 1990 WL 282587 (S.D.Tex.), 56 Empl. Prac. Dec. P 40,617, 118 Lab.Cas. P 10,561

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.